NO. 91-7094

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

WILLIE LEE RICHMOND,

Petitioner,

-vs-

SAMUEL A. LEWIS, Director, Arizona Department of Corrections; and ROGER CRIST, Superintendent of the Arizona State Prison,

Respondents.

ON WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

RESPONDENTS' SUPPLEMENTAL BRIEF

GRANT WOODS
Attorney General of
the State of Arizona

PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section

JACK ROBERTS
Assistant Attorney General
(Counsel of Record)
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542-4686

Attorneys for RESPONDENTS

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

INTRODUCTORY COMMENT

This Court's Rule 15.7 permits any party to file a supplemental brief when new authority has issued after that party's last pleading was filed. When respondents filed the response to the petition for a writ of ceritorari on February 18, this Court had not decided Stringer v. Black, ___U. S.___ 1992 Wl 40766 (Mar. 9, 1992). In view of the Court's decision in that case, and the great reliance petitioner places upon it in his reply of March 11, respondents respectfully file this supplemental pleading distinguishing this case from Stringer.

I

Three of the five Arizona Supreme Court justices who considered Richmond's case held that the especially heinous circumstance did not exist. Therefore, his sentence of death was not imposed on the basis of that circumstance. Richmond v. Ricketts, 640 F. Supp. 767, 795-96 (D. Ariz 1986) (Richmond had no standing to challenge his sentence on the basis of the especially heinous factor because the majority of the Arizona Supreme Court found it did not exist.) This fact alone immediately distinguishes this case from Stringer, where the jurors did find the circumstance -- later held invalid for vagueness -- to apply.

II

The majority of judges on the Arizona Supreme Court who did not find the especially heinous factor applicable, did independently reweigh the remaining two aggravating circumstances

against the mitigation. In a section titled "Independent Review," Justice Holohan, speaking for the entire court, said:

> In death penalty cases, this court will conduct an independent examination of the record to determine for ourselves the presence or absence of aggravating and mitigating circumstances and the weight to give each. We also independently determine the propriety of the sentence.

State v. Richmond, 136 Ariz. 312, 320, 666 P.2d 57, 65 (1983). Although Justices Cameron and Gordon did not find the especially heinous factor applicable, they did agree that Richmond's prior history of violent crimes -- based on the unchallenged circumstances established by the armed kidnapping and another first-degree murder -- warranted the death penalty:

> The criminal record of this defendant, however, clearly places him above the norm of first degree murderers. He has been convicted of another first degree murder and a kidnapping, each arising in separate incidents. This history of serious violent crime justifies the imposition of the death penalty.

State v. Richmond, 136 Ariz. at 323-24, 666 P.2d at 68-69. Thus, Richmond is simply wrong at page 8 of his reply when he says that Justices Cameron and Gordon, who did not find the especially heinous factor, voted to affirm the sentence "without any indication that they had independently determined the mitigating circumstances were not 'sufficiently substantial' in relation to the two statutory aggravating circumstances which remained."

Richmond is saying that this Court should presume that Justices Cameron and Gordon did not independently review and reweigh the aggravation and mitigation because they did not explicitly say so in their concurrence of the death penalty. This Court has already said in another case from Arizona that the Court will presume that judges know the law and apply it to the facts. Walton v. Arizona, ___U.S.___, 110 S. Ct. 3047, 3057, 111 L. Ed. 2d 511 (1990). Justice Holohan announced the already familiar standard of independent review; it is specious to argue that Justices Cameron and Gordon must be presumed to have ignored it because they did not re-announce it in their concurrence in the penalty. Justice Cameron authored at least 21 opinions for the Arizona Supreme Court in which he specifically noted that court's duty to independently examine aggravation and mitigation and to determine the weight to give each. Justice Gordon wrote at least 14 opinions for that court reiterating that same obligation. (See Appendix.)

The Arizona procedure whereby the Arizona Supreme Court independently weighs the evidence to determine the propriety of the death sentence distinguishes the instant case from Clemons v. Mississippi, 494 U.S.___, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), where this Court could not tell whether the Mississippi Supreme Court had held harmless the jurors' consideration of a concedely vague circumstance, or had simply eliminated the circumstance on appellate review and

reweighed the aggravation and mitigation. It is clear from Arizona precedence that Justices Cameron and Gordon were saying that, even without the especially heinous factor, the remaining aggravation was sufficient to warrant the death penalty.

III

The other crucial distinction between Stringer and Richmond's case is that there was no question that the aggravating circumstance in Stringer was unconstitutionally vague. The instruction given to the Mississippi jurors, with no further limiting construction of the language, violated this Court's holding in Godfrey. By contrast, this Court has upheld the Arizona Supreme Court's limiting construction of the especially heinous, cruel or depraved circumstance. Walton v. Arizona, 110 S. Ct. 3047, 3056-57. Judicial sentencing is precisely why this Court distinguished the Arizona circumstance from those condemned in Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), and Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980). Id.

Petitioner's challenge in this Court is that two Arizona justices incorrectly applied a circumstance this Court has already held constitutional. In other words, he simply disagrees with the Ninth Circuit's application of the rational factfinder test this Court said was the proper standard of review in Lewis v. Jeffers, 497 U.S.___, 110

S. Ct. 3092, 111 L. Ed. 2d 606 (1990). That is a matter of state law to which the Ninth Circuit has properly applied this Court's test in Jeffers.

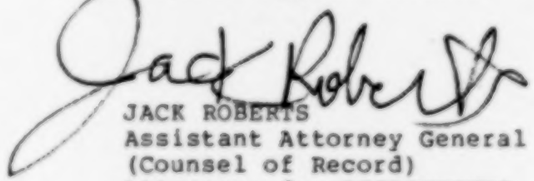
CONCLUSION

Despite petitioner's attempts to convince the Court to the contrary, none of the concerns of Stringer or Clemons is present in this case and the Court should deny certiorari.

Respectfully submitted,

GRANT WOODS
Attorney General

PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section



JACK ROBERTS
Assistant Attorney General
(Counsel of Record)
Attorneys for RESPONDENTS

APPENDIX

In the following cases, Justice Cameron, writing for the court, expressed the duty of the Arizona Supreme Court to independently examine aggravation and mitigation and the weight to give each. State v. Greenway, 101 Ariz. Adv. Rep. 7, 11, 15 (Dec. 2, 1991); State v. White, 168 Ariz. 500, 510, 512, 815 P.2d 869, 879, 881 (1991); State v. Fulminante, 161 Ariz. 237, 254, 778 P.2d 602, aff'd, ___ U.S. ___, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); State v. Vickers, 159 Ariz. 186, 532, 544-45, 768 P.2d 1177, 1189-90 (1989), cert. denied, ___ U.S. ___, 110 S. Ct. 3298, 111 L. Ed. 2d 806 (1990); State v. Beaty, 158 Ariz. 232, 242, 762 P.2d 519, 529 (1988), cert. denied, ___ U.S. ___, 109 S. Ct. 3200, 105 L. Ed. 2d 708 (1989); State v. McMurtrey, 151 Ariz. 105, 108, 110, 726 P.2d 202, 205, 207 (1986), cert. denied, 480 U.S. 911 (1987); State v. Castaneda, 150 Ariz. 382, 395, 724 P.2d 1, 14 (1986; State v. Correll, 148 Ariz. 468, 478, 715 P.2d 721, 731 (1986); State v. Poland (Michael), 144 Ariz. 412, 415, 698 P.2d 207, 210 (1985), aff'd, 476 U.S. 147 (1986); State v. Poland (Patrick), 144 Ariz. 388, 404, 698 P.2d 183, 199 (1985), aff'd, 476 U.S. 147 (1986); State v. Clabourne, 142 Ariz. 335, 347, 690 P.2d 54, 66 (1984); State v. Summerlin, 138 Ariz. 426, 435-36, 675 P.2d 686, 695-96 (1983); State v. Smith (Robert), 138 Ariz. 79, 85, 673 P.2d 17, 23 (1983), cert. denied, 465 U.S. 1074 (1984); State v. Lambright, 138 Ariz. 63, 75, 673 P.2d 1, 13 (1983), cert. denied, 469 U.S. 892 (1984); State v. Harding, 137 Ariz. 278, 293, 670 P.2d 383, 398 (1983), cert denied, 465 U.S. 1013 (1984); State v. Gretzler, 135 Ariz. 42, 54, 659 P.2d 1, 13, cert. denied, 461 U.S. 971 (1983); State v. Blazak, 131 Ariz. 598, 602-04, 643 P.2d 694, 698-700, cert. denied, 459 U.S. 882 (1982); State v. Watson, 129 Ariz. 60, 62-63, 628 P.2d 943, 945-46 (1981), cert. denied, 456 U.S. 981 (1982); State v. Steelman, 126 Ariz. 19, 23, 27, 612 P.2d 475, 479, 483, cert. denied, 449 U.S. 913 (1980); State v. Madsen, 125 Ariz. 346, 352, 609 P.2d 1046, 1052, cert. denied, 449 U.S. 873 (1980); State v. Brookover, 124 Ariz. 38, 42, 601 P.2d 1322, 1326 (1979).

In the following case, Justice Gordon, writing for the court, expressed the duty of the Arizona Supreme Court to independently examine aggravation and mitigation and the weight to give each. State v. Lavers, 168 Ariz. 376, 391, 814 P.2d 333, 348 (1991); State v. Hinchey, 165 Ariz. 432, 439, 799 P.2d 352, 359 (1990); State v. LaGrand (Walter), 153 Ariz. 21, 34, 734 P.2d 563, 576, cert. denied, 484 U.S. 872 (1987); State v. Rossi, 146 Ariz. 359, 365, 706 P.2d 371, 377 (1985); State v. Hooper, 145 Ariz. 538, 550, 703 P.2d 482, 494 (1985), cert. denied, 474 U.S. 1073 (1986); State v. Bracy, 145 Ariz. 520, 536, 703 P.2d 464, 480 (1985), cert. denied, 474 U.S. 1110 (1986); State v. Nash, 143 Ariz. 392, 404, 694 P.2d 222, 234, cert. denied, 471 U.S. 1143 (1985); State v. Fisher, 141 Ariz. 227, 251-52, 686 P.2d 750, 774-75, cert. denied, 469 U.S. 1066 (1984); State v. McCall, 139

Ariz. 147, 160, 677 P.2d 920, 933 (1983), cert. denied, 467 U.S. 1220 (1984); State v. McDaniel, 136 Ariz. 188, 200, 665 P.2d 70, 82 (1983); State v. Zaragoza, 135 Ariz. 63, 68, 659 P.2d 22, 27, cert. denied, 462 U.S. 1124 (1983); State v. Ortiz, 131 Ariz. 195, 207, 639 P.2d 1020, 1032 (1981), cert. denied, 456 U.S. 984 (1982); State v. Britson, 130 Ariz. 380, 387, 389, 636 P.2d 628, 635, 637 (1981); State v. Mata (Luis), 125 Ariz. 233, 242, 609 P.2d 48, 57, cert. denied, 449 U.S. 921 (1980).